(1)

No. 97- **97 • 503** SEP 17 1997

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1996

PAUL JOHNSON; KEVIN WADSWORTH; LAUREN COOPER; RAY SEBASTIAN & BARBARA SEBASTIAN, individually and on behalf of all others similarly situated,

Petitioners,

v.

DAVID KNOWLES; REPUBLICAN CENTRAL COMMITTEE OF EL DORADO COUNTY; STEVEN BAILEY; ROBERT BECKER; ED BORBA; BERNARD CARLSON; MERLIN CHARDI; CHRISTINA COWELL; CHARLES CHRISMAN; DAN DELLINGER; SUSAN EMIGH; TOM EMIGH; MICHAEL FRENN; MALOA GRIBKOFF; KEVIN HANLEY; TOM SCHUMACHER; JOHN STELZMILLER; LAVETA STELZMILLER; DAVID TITUS & DOES 1-25,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

G. MICHAEL GERMAN, ESQ.
Counsel of Record
22 Second Street - Suite 310
San Francisco, CA 94105-3406
(415) 536-1838

Attorney for Petitioners

86 pp

QUESTIONS PRESENTED

Whether the action of a county central committee, in twice removing two gay men twice elected to it, was state action for purposes of pleading 42 USC §§1983, 1985(3) and 1986 civil rights claims on behalf of the two committeemen ousted and the 1,500 voters who elected them, and for the purposes of protecting their fundamental voting and political rights under the I and XIV Amendments.

Whether homosexuals constitute a suspect class for purposes of pleading 42 USC §§1985(3) and 1986 claims.

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities Cited iv

Petition for Writ of Certiorari 1

Opinion Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved . . . . . 1 and AX D-1

Statement of the Case 2

Reasons for Granting the Writ 8

I. The Ninth Circuit Applied Too Strict A Standard of Review 8

II. The Ninth Circuit Ignored Facts Pled or Capable of Being Pled 9

III. The Ninth Circuit Downplayed Assemblyman Knowles' Position and Power 11

IV. The Ninth Circuit Cast the Committee and Its Members Out of Their State Roles . . 16

V. The Ninth Circuit Ignored the Issue of Whether 42 USC §§1985(3) and 1986 Claims Were Pled 27

Conclusion 30

APPENDIX

Appendix A - Opinion of the United States Court of Appeals for the Ninth Circuit Filed May 21, 1997 . . . . . AX A-1

Appendix B - Order of the United States Court of Appeals for the Ninth Circuit Filed July 2, 1997 . . . . . AX B-1

Appendix C - Order of the United States Court of Appeals for the Ninth Circuit Filed September 10, 1997 . . . . . AX C-1

Appendix D - Statutory Provisions Involved AX D-1

Appendix E - Petitioners' First Amended Complaint (FAC) in Case No. CIV-S-95-835 MLS (PAN) . . . . . AX E-1

TABLE OF AUTHORITIES CITED

I. Cases

Able v. U.S., - F.Supp. - (ED, NY: 1997) 28

Acanfora v. Board of Education of Montgomery County, 491 F.2d 498 (4th Cir. 1974) 22

Adickes v. Kress, 398 U.S. 144 (1970) 25

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 16

Anthony v. County of Sacramento, 845 F.Supp. 1396 (ED, CA: 1994) 14, 15

Aumiller v. University of Delaware, 434 F.Supp. 1273 (DE: 1977) 22

Banchy v. Republican Party of Hamilton County, 898 F.2d 1192 (6th Cir. 1990) 23

Bernheim v. Litt, 79 F.3d 318 (2nd Cir. 1996) 9

Blank v. Heineman, 771 F.Supp. 1013 (NE: 1991) . . . 23

Bowers v. Hardwick, 478 U.S. 186 (1986) . . . 22, 28, 29

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930) . . 19

Burson v. Freeman, 504 U.S. 199 (1992) 24

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 26

Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101 (6th Cir. 1995) 8

Dang Vang v. Vang Xiong X. Toyed, 944 F.2d 476 (9th Cir. 1991) 14, 15

DeSantis v. Pacific Telephone & Telegraph Co., Inc., 608 F.2d 327 (9th Cir. 1979) 7, 28, 30

Doe v.Commonwealth's Attorney, 403 F.Supp 1199 (ED, VA: 1975) 28

Equality Foundation of Greater Cincinnati v. Cincinnati, 54 F.3d 261 (6th Cir. 1995) 29

Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989) 17

Evans v. Romer, 882 P.2d 1335 (Col. 1994) 22

Federspiel v. Ohio Republican Party, 867 F.Supp. 627 (1994) 23, 24

Felder v. Casey, 487 U.S. 131 (1988) 9, 20

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978) 20, 21

Gay Law Students Assn. v. Pacific Telegraph & Telephone Co., 24 Cal.3d 458 (1979) 22

Gay Students Organization of University of New Hampshire v. Banner, 509 F.2d 652 (1st Cir. 1974) . . 22

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) . . . 16

Griffin v. Breckenridge, 403 U.S. 88 (1971) 27

Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) . . 19, 20

Haddock v. Board of Dental Examiners of California,
777 F.2d 462 (9th Cir. 1985) 9

High Tech Gays v. DISCO,
895 F.2d 563 (9th Cir. 1990) 27, 28, 30

Holmes v. California Army National Guard,
- F.3d - (9th Cir. 1997) 22, 28

Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983) . . 25

Jackson v. Metropolitan Edison Co.,
419 U.S. 345 (1974) 21, 26

Laxalt v. McClatchy, 622 F.Supp. 737 (NV: 1985) 15, 16

Lillard v. Shelby County Board of Education,
76 F.3d 716, 724 (6th Cir. 1996) 9

Lugar v. Edmondson Oil Co., Inc.,
457 U.S. 922, 929 (1982) 14

Malone v. Superior Court, 40 Cal.2d 546 (1953) . 17, 18

Moore v. City of Costa Mesa,
886 F.2d 260 (9th Cir. 1989) 8

Moore v. Panish, 32 Cal.3d 535 (1982) 17, 18

Morse v. Republican Party of Virginia,
116 S.Ct. 1186 (1996) 21, 22

Murphy v. Chicago Transit Authority,
638 F.Supp. 464 (ND, IL: 1986) 14, 15

Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) 22, 29

Neitzke v. Williams, 490 U.S. 319 (1989) 8

N.L. Industries, Inc. v. Kaplan,
23 F.3d 226 (9th Cir. 1986) 8

Payne v. Tennessee, 501 U.S. 808 (1991) 27

Republican Party of Arkansas v. Faulkner County, Arkansas, 49 F.3d 1289 (1995) 21, 22, 26

Reynolds v. Sims, 377 U.S. 533 (1964) 24

Romer v. Evans, 116 S.Ct. 1620 (1996) . . . 7, 22, 28-30

San Francisco County Democratic Central Committee v. Eu, 792 F.2d 802 (9th Cir. 198) 16

San Francisco County Democratic Central Committee v. Eu, 826 F.2d 814 (9th Cir. 1987) . . 16, 17

Screws v. U.S., 325 U.S. 91 (1945) 15

Smith v. Allwright, 321 U.S. 649 (1944) 21

Smith v. Salt River Project,
109 F.3d 586 (9th Cir. 1997) 21

State ex rel Hayes v. Jennings,
173 Ohio St. 370 (1962) 23

Stout v. Democratic County Central Committee,
40 Cal.2d 91 (1952) 26

Tashjian v. Republican Party of Connecticut,
479 U.S. 208 (1986) 16, 17

Terry v. Adams, 345 U.S. 461 (1953) 20, 21

Thornburg v. Gingles, 478 U.S. 30 (1986) 21

Unger v. Superior Court, 37 Cal.3d 612 (1984) 18

United Brotherhood of Carpenters & Joiners v. Scott,
463 U.S. 825 (1983) 27

U.S. v. Classic, 313 U.S. 299 (1941) 14

U.S. v. Moseley, 238 U.S. 383 (1915) 22

Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989) . 22

West v. Atkins, 487 U.S. 42 (1988) 14

Western Mining Council v. Watt,
642 F.2d 618 (9th Cir. 1981) 26

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 24, 30

II. Statutes & Rules

A. Federal

28 USC §1254(1) 1

28 USC §1331 2

28 USC §1343 . . . . . 2, 20

28 USC §1357 2

28 USC §1367 . . . . . 2, 6

28 USC §2201 . . . . . 2, 6

42 USC §1971a1 21

42 USC §1983 . . . . . 1, 2, 6, 7, 9, 19, 20

42 USC §1985(3). 1, 2, 6, 7, 27, 28

42 USC §1986 . . . . . 1, 2, 6, 7

Federal Rule of Civil Procedure 12b6 . . . . . 6, 19

Supreme Court Rule 13.5 1

B. State

Cal. Code of Civil Procedure §410.30a 7

Cal. Code of Civil Procedure §418.10a 7

Cal. Constitution, Art. XX, §3. 10

Cal. Elections Code §6402 18

Cal. Elections Code §§7050-8144 . . . . . 10-13, 26

Cal. Elections Code §§10500-10520 10

Cal. Elections Code §15470 10

Cal. Elections Code §15501 12

Cal. Elections Code §18540-18700 10

Ohio Revised Code, §305.02 23

PETITION FOR WRIT OF CERTIORARI

Petitioners Paul Johnson, Kevin Wadsworth, Lauren Cooper, Ray Sebastian and Barbara Sebastian, individually and on behalf of all others similarly situated, request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Johnson v. Knowles*, 113 F.3d 1114 (9th Cir. 1997), attached at Appendix (AX) A.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment in this case on May 21, 1997. On July 2, 1997, a *sua sponte* Order from the Ninth Circuit directed the parties to brief "the question of whether this case should be reheard en banc," which briefing was completed on July 28, 1997. AX B. Petitioners sought, and on August 8, 1997 were granted, an extension of time until September 18, 1997 to Petition for a Writ of Certiorari, pursuant to Supreme Court Rule 13.5. On September 10, 1997, the Ninth Circuit issued its Order denying rehearing and rejecting the suggestion for rehearing en banc. AX C.

This Court's jurisdiction in invoked under 28 USC §1254(1).

STATUTORY PROVISIONS INVOLVED

42 USC §§1983, 1985(3) and 1986, as stated in AX D.

STATEMENT OF THE CASE

The fundamental question in this case is whether the action of a county central committee, in twice removing two gay men twice elected to it, was state action for purposes of pleading 42 USC §§ 1983, 1985 and 1986 civil rights claims. Inherent in that question is whether homosexuals are a suspect class for purposes of §§1985 and 1986. To appreciate the national importance of the issues in this case, and to recognize why granting this Petition is necessary to protect the fundamental voting rights of not just homosexual, but all, Americans, its history must be considered.

Petitioners Paul Johnson and Kevin Wadsworth, a gay couple who are longtime registered Republicans, and their named co-Petitioners, individually and on behalf of the class they hope to represent, filed this action to be reinstated to the Republican Central Committee of El Dorado County in U.S. District Court for the Eastern District of California. Jurisdiction was based upon the provisions of 28 USC §§ 1331, 1343, 1357, 1367 and 2201. They also sought damages from former California Assemblyman David Knowles and from those Committee members who voted to remove them, and declaratory relief invalidating the Committee's bylaws under which they were removed.

Johnson and Wadsworth, after a decade of activity in Republican politics, including membership on central committees in other California counties, were first elected to El Dorado County's Committee in the 1992 California primary and reelected to it in the 1994 primary for successive two-year terms commencing each January after their election. They won election in 1994 "despite the best efforts of certain of their colleagues on the Central Committee and other California Republicans, including but not limited to

Defendants KNOWLES and CARLSON, who vowed 'We've got to get rid of those faggots,' and actively worked to do so." First Amended Complaint (FAC), AX E, at ¶7.

Johnson and Wadsworth lived together in El Dorado County at "The Lone Antler Ranch," which they occasionally leased for receptions, fundraising and other uses. Proceeds from Ranch rentals were used to defray the cost of medical treatment for Wadsworth, who is a disabled Vietnam-era Marine Corps veteran suffering from AIDS. AX E, at ¶8. Johnson leased the Ranch to the Katie Hirning For Congress Campaign for a September 17, 1994, fundraiser for Ms. Hirning, the Democratic candidate for the November, 1994 Congressional election, in which she opposed incumbent Republican Congressman John Doolittle. Per the Committee's bylaws, the lease specifically provided that neither Johnson's nor Wadsworth's name would be used in connection with the fundraiser, which was held as scheduled. Neither Johnson nor Wadsworth took part in it except as lessors, AX E, at ¶9, a practice also engaged in by Respondent Tom Schumacher with respect to leasing his own property to Democrats for fundraisers, but without the same consequences that Petitioners suffered. AX E, at ¶16.

On September 5, 1994, a week before the Committee's regularly scheduled meeting, Johnson learned that his father had died in Ohio that day. Both Petitioners immediately made plans to attend the funeral and advised Respondents Schumacher and Laveta Stelzmiller, Assemblyman Knowles' appointee to the Committee, that it was possible neither would be able to attend the September 12 meeting. Wadsworth did not travel to Ohio due to his need to receive AIDS treatment on the morning of September 12, but he did go to the Committee meeting that evening. The meeting was called to order by Respondent David Titus and pro-

ceeded with its business, including electing Respondent Robert Becker, Assemblyman Knowles' former legislative aide, to the Committee, until Wadsworth began to feel ill and left. Prior to his departure, neither the notice of, agenda for nor any discussion at the meeting gave Wadsworth any sign that any action was to be taken against him. AX E, at ¶¶3 and 11.

Under Titus' direction, the Committee then went into "Executive Session," despite no provision for doing so in its bylaws or in the California Elections Code (CEC). Respondent Tom Emigh initiated discussion of Petitioners' role in the Hirning fundraiser held at the Ranch and moved that each be removed from the Committee for allegedly failing to support Republican candidates and for providing support to Democratic candidates. After discussion supporting the motion from Respondents Bernard Carlson and Becker, the motion passed 13 to 1 with 3 abstentions. Petitioners pled on information and belief that Knowles instructed, prevailed upon or otherwise influenced Becker and Laveta Stelzmiller to vote for Petitioners' ouster. AX E, at ¶12.

Between December 31, 1994, and January 3, 1995, Laveta Stelzmiller mailed Committee members notice of its January 9, 1995, organizational meeting, but no agenda was enclosed. At that meeting, Wadsworth was sworn into his re-elected Committee office and Titus, Schumacher, Becker and Maloa Gribkoff were elected Chairman, Vice-Chairman, Secretary and Treasurer, respectively. An organizational agenda given to those present at the meeting listed "Adoption of By-laws" as item III, but a copy of the proposed bylaws was not included with the notice. Wadsworth objected to consideration of these proposed bylaws as out-of-order due to inadequate notice, but Titus overruled his objection and the bylaws were adopted. AX E, at ¶14.

Emigh then stated his intention to seek Wadsworth's removal at the Committee's next meeting, set for February 13, 1995, under new bylaw Article XIX "for engaging in actions injurious to the Committee." Petitioners pled on information and belief that Titus had directed Becker to draft these new bylaws prior to the January 9, 1995, meeting and that other Respondents, including Emigh and Knowles, knew that they would be drafted and presented for adoption on that date. AX E, at ¶15.

On February 6, 1995, Becker mailed a notice of the February 13, 1995, meeting to all members of the Committee, accompanied by an agenda which listed as item IXA "Disciplinary Action." At the meeting, Emigh moved, and Carlson seconded, Wadsworth's removal "for engaging in actions deemed injurious to" the Committee. After discussion of the motion from, among others, Becker, Carlson, Emigh and Schumacher addressing alleged statements made and actions taken by Wadsworth before January 9, 1995; alleged criticism of the Committee made by Wadsworth, overheard by Respondent Susan Emigh, Tom's wife, and recorded in her "sworn testimony" not produced at the meeting; a December 15, 1994, letter allegedly sent by Hirning to her "supporters," which was never shown to Wadsworth; concern that the Committee beware of expelling members who rent property to Democrats, in light of Schumacher's regularly renting property jointly owned by him to Democrats; and Knowles' admission to Schumacher that his reason for pushing, directly or indirectly through his aide Becker and other members of the Committee, Wadsworth's removal was due to his "being homosexual," the motion was passed 9 to 3 with 1 abstention. AX E, at ¶16.

Petitioners' class action complaint was filed on May 8, 1995, and alleged Respondents acted under color of state

law, including the CEC and the Committee's 1995 bylaws, in violating Petitioners' rights under 42 USC §§1983, 1985 and 1986. AX E, at ¶28. Petitioners' remaining claims pled state constitutional, statutory and common law tort theories of relief, along with a federal declaratory relief claim under 28 USC §2201 against those bylaws. AX E, at ¶¶29-54. They prayed for jury trial; special, general and punitive damages; costs, interest, and attorneys fees; and for injunctive relief by reinstating Wadsworth.

Although certification was not determined prior to dismissal, certain of the class action allegations are relevant to this Petition. Johnson and Wadsworth sued on behalf of themselves and those registered Republicans in their electoral district who voted for them in the June, 1992 and 1994 primaries and "whose votes were thereafter twice nullified" by Respondents' acts. As based upon those elections' returns, the potential class has a membership of 1,500-2,500 persons and its members share common damages by suffering "prejudice to and dilution and deprivation of their rights as voters affected by Defendants'" twin ousters of Johnson and Wadsworth. AX E, at ¶¶21-23 and AX A-3.

Respondents challenged Petitioners' complaint with a FRCvP 12b6 motion to dismiss for failure to state a claim, which was granted. Petitioners' 42 USC §§1985(3) and 1986 claims were dismissed without leave to amend, but their 42 USC §1983 and 28 USC §2201 declaratory relief claims were dismissed with leave to amend. Joined by fellow Republicans Ted and Lauren Cooper and Ray and Barbara Sebastian, Petitioners timely filed their FAC, to which Susan Emigh was added as a Defendant. Respondents again moved to dismiss under FRCvP 12b6 and their motion was granted in full and without leave to amend, the district court noting that Petitioners' theory of the case

"simply stretches the public function test too far."

Judgment issued upon the order of dismissal and an appeal of right was timely filed in the Ninth Circuit Court of Appeals on April 18, 1996. Pursuant to 28 USC §1367d, Petitioners filed a verified class action complaint on March 18, 1996, in the El Dorado County Superior Court similar to their district court suit but purged of its federal claims. Anticipating recusals among the El Dorado County bench, Petitioners moved to transfer venue elsewhere. At the same time, Respondents moved to stay that action pending resolution of the federal appeal, pursuant to Cal. Code of Civ. Procedure §§410.30a and 418.10a2. Respondents' motion was granted, but only after *all* the judges of the El Dorado County Superior Court recused themselves and a visiting judge was assigned the case. Justice was hardly swift in clearing that procedural hurdle: Respondents' motion to stay, filed in April, 1996, was not heard until July, 1996, and the court's ruling was not entered until September, 1996 - a *five-month* delay.

Briefing was completed to and the case was orally argued before the Ninth Circuit on April 16, 1997. Its unanimous Panel decision, filed May 21, 1997, affirmed the district court's dismissal and held that the actions of neither Knowles nor of his other 17 co-Respondents individually or conspiratorially constituted the state action necessary to support federal jurisdiction over Petitioners' 42 USC §1983 claims for relief. AX A. Unaddressed by the Panel was the question timely preserved and presented of whether homosexuals are a protected class for purposes of Petitioners' 42 USC §§1985(3) and 1986 claims, an issue ripe for reconsideration in light of *Romer v. Evans*, 116 S.Ct. 1620 (1996).

Petitioners now seek *certiorari* on the grounds that

recurring issues of national and exceptional importance relating to the fundamental right to vote remain unresolved in this case. This Honorable Court is the sole forum capable of redressing the unaccepted and unusual departures from the normal course of judicial proceedings undertaken by the Ninth Circuit in its cursory treatment of this case's unconsidered facts and unexamined questions.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Applied Too Strict A Standard of Review

The opinion below rightly noted that *de novo* review required it to "take all allegations of material fact ... as true and construe them in the light most favorable to the Plaintiffs" and uphold dismissal only if "it appears beyond doubt that the Plaintiffs can prove no set of facts in support of their claim that would entitle them to relief." AX A-5.

Beyond these general standards, however, the Ninth Circuit did not proceed to review the FAC under more specific, and liberal, standards governing civil rights complaints like that at issue here. The Panel recognized neither that reasonable inferences must be drawn from the facts pled, *NL Industries, Inc. v. Kaplan*, 23 F.3d 226, 228 (9th Cir. 1986), and construed as best benefitting the pleader, *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989), nor, where more than one inference may flow, those to be adopted are whichever support valid claims. *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). No matter how unlikely or improbable of proof the alleged facts are, they must be taken as true. *Neitzke v. Williams*, 490 U.S. 319, 326-327 (1989). A complaint should proceed if the facts support

any valid theory of relief, *Haddock v. Board of Dental Examiners of California*, 777 F.2d 462, 464 (9th Cir. 1985), not just those pled. Dismissal is "especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development," *Baker v. Cuomo*, 58 F.3d 814, 818-19 (2nd Cir. 1995) (*sua sponte* dismissal of *pro se* §1983 voting rights claim), or in civil rights actions, which "should be scrutinized with special care." *Lillard v. Shelby County Bd. of Ed.*, 76 F.3d 716, 724 (6th Cir. 1996); *Bernheim v. Litt*, 79 F.3d 318, 321 (2nd Cir. 1996).

> "'*...§1983 provides a 'uniquely federal remedy against incursions ... upon rights secured by the Constitution and laws of the Nation,' ... and is to be accorded 'a sweep as broad as its language.*'" *Felder v. Casey*, 487 U.S. 131, 139 (1988) (emphasis added).

The Panel cited none of these expanded but accepted criteria in affirming dismissal; the reasonable inference flowing from their absence is that they were ignored, a departure from accepted practice meriting *certiorari*.

II. The Ninth Circuit Ignored Facts Pled or Capable of Being Pled

That part of the Panel's opinion stating its view of the facts in this case is revealing for what it omits. In the FAC and in the governing law are found the following factual allegations that were lost in the Panel's opinion.

1. County central committees exist and operate "solely by virtue of, under and in furtherance of the laws of [California], including, but not limited to Cal. Elections Code

(CEC) §7250-7470 and 18540-18700." AX E, at ¶2.[1] Central committee election costs, unlike others, are borne by the state, not the candidates themselves. *Cf.*, CEC §§10502b and 10520 with CEC §8104. *See also,* CEC §§8144 (certification of central committee elections) and 7000 (reporting members to Secretary of State).

2. While noting that Johnson and Wadsworth leased the Ranch to a Democratic candidate for a fundraiser, AX A-3, the Panel ignored Petitioners' allegation that this practice was "engaged in by at least one other Defendant with respect to his own property, but without the same consequences [i.e., removal] that Petitioners suffered," AX E,

---

[1]CEC §§7400-7444 are a comprehensive regulatory plan embracing how state officials may hold or appoint to committee membership (§§7404-7406); the requirement of an oath before a state-certified officer under Article XX, Sec. 3 of the state constitution to "support and defend the Constitution of the United States and the Constitution of the State of California ... " *not the bylaws of a member's party* (§7408); how vacancies are filled (§§7409 & 7410); the limited bases for removals (§§7411 & 7413); monthly use of state buildings for committee meetings without charge (§7430) and committees' limited discretion in making rules and regulations such as the bylaws under which Johnson and Wadsworth were twice ousted (§7442). These statutes are much more detailed than the sections of the CEC regulating the state central and district committees, probably because central committee members are primarily elected, not appointed. It is reasonable to infer that the Legislature, if not the parties themselves, recognized the potential for, if not experienced actual, misconduct in central committee elections and regulated them more to prevent voters' rights from being abused. Indeed, CEC §15470 states both the obvious rule that central committee candidates "who receive the highest number of votes shall be declared elected" and the more subtle proviso that no such candidate shall be elected unless he has received at least enough votes as he would have been required to obtain in signatures needed to place his name on the ballot. Clearly, these laws were enacted to prevent either manipulation of central committee elections or frustration of their results by cliques.

at ¶16, and that this lease "specifically provided that neither [Petitioners'] name would be used in connection with the fundraiser," per the Committee's bylaws. AX E, at ¶9.

3. Adjunct to Knowles' membership in the California Assembly, he maintained his local legislative office in the same suite occupied by the Committee, where he allegedly displayed campaign materials on his own behalf in violation of state and county laws "prohibiting such politicking in Central Committee offices, but acquiesced to by certain members" of the Committee, including Respondents. Moreover, his former legislative aide Becker and his appointee Laveta Stelzmiller were Committee members who twice voted to remove Petitioners and, "along with other members of his legislative staff," were directed by Knowles "on the 'official' time and expense of the California State Assembly, to ... bring about the ouster of Johnson and Wadsworth from the Committee." AX E, at ¶¶3 and 15.

III. The Ninth Circuit Downplayed Assemblyman Knowles' Position and Power

The Panel's opinion properly recognized that "Knowles, in his capacity as a member of the California Assembly, is a public official," but erred in finding that his

> *"ex officio* membership on the Committee derives from his position as the Republican nominee for the Assembly, not from his status as a California Assemblyman.[2] ...

---

[2]In 1995, Knowles was completing his last Assembly term, per California's term limits law. CEC §7404b provides that if the party's nominee receives less votes for the office he seeks than a write-in candidate does, the write-in assumes *ex officio* membership on the

> Knowles has the same rights and powers as the other Committee members, with one immaterial exception: As an incumbent office holder, Knowles can appoint an alternate Committee member to vote in his stead without the Committee's authorization. Cal. Elec. Code §7406. Thus, Knowles's status as an Assemblyman gives him no direct power over the Committee and its actions; he has no greater power on the Committee as an Assemblyman than any other Committee member has as an elected member." AX A-7, citing CEC §7404. *Cf.*, §7404a.

The district court and the Panel misread CEC §7406 by holding "the only advantage gained by virtue of Knowles' status as an Assembly member is that the Committee cannot withdraw his power to appoint an alternate," compared to the Committee's "discretion to give this authority to any ex officio member, whether an incumbent officeholder or not." *Cf.* AX A-7. Comparing §7406 to §§7404 and 7405 reveals that only incumbent, *ex officio* Committee members' appointive authority is unfettered by committee discretion; non-incumbent *ex officio* members' appointive authority remains subject to Committee discretion.

---

committee, provided he is a Republican. The position is thus not a private position, but one created by state law for the elected Republican officeholder; a Republican nominee may be an *ex officio* member only when a non-Republican holds the office the nominee seeks. However, even the status of nominee stems from a public vote. An Assembly nominee is the winner of a public primary in which he is listed on a state ballot, in a primary conducted by the state, whose results are compiled by the Secretary of State. CEC §15501. Although Knowles obtained his position as a nominee, he could not have kept it if a write-in Republican had been elected to the Assembly instead of him.

Nor do the grounds for removal stated in CEC §§7411 and 7413 apply to *ex officio* committee members like Knowles. The *ex officio* position reserved for an elected state official, even if codified as for a nominee, is thus materially more secure than the position held by one elected or otherwise appointed to a committee.

It is certainly reasonable to infer that he who holds unqualified, more secure power holds greater power and influence over those with lesser power, i.e., over Committee members other than incumbent *ex officios* like Knowles, the only such Committee member alleged to have acted in Johnson and Wadsworth's removal. It is similarly reasonable to infer that such a member's views receive more credence and respect from Committee colleagues than do those of one subject to either Committee discretion or statutory removal, along with that materially enhanced status and credibility normally accompanying public office, whether as a nominee or as an incumbent.

The Panel thus mistakenly held that Knowles' *ex officio* Committee membership, initially granted by CEC §7404a when he was nominated for the Assembly, was not subsequently - or materially - enhanced by his election thereto. Moreover, the FAC pled that Knowles was an *ex officio* Committee member "by virtue of his status as a member of the California Assembly," AX E, at ¶3, not by virtue of his former status as Assembly nominee, even if that legal and factual inference is similarly, but not equally, true. The Panel should have accepted this material allegation as controlling and neither weighed it against nor replaced it with competing inferences from Knowles' nominee status that destroyed Petitioners' claim, contrary to *Moore* and *Columbia Natural Resources, supra.*

The Panel cited *West v. Atkins*, 487 U.S. 42, 49 (1988), for the rule that a "person acts under color of state law if he 'exercise[s] power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,'" (quoting *U.S. v. Classic*, 313 U.S. 299, 326 (1941), and noted that "[G]enerally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991), quoting *West, supra*, at 49-50. But, the Panel omitted the sentence from *West* just before the one it chose to quote: "It is firmly established that a defendant acts under color of state law *when he abuses the position given to him by the state*." *West, supra*, quoted in *Dang, supra* (emphasized in *Dang*). AX A-6.

"Misuse of power, possessed by virtue of state law and possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of law." *Classic, supra,* at 326, cited approvingly in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 929 (1982), and *Dang, supra*, at 479. Knowles' greater potential for influence and its misuse was possible only because his Assembly seat gave him power undiminished by Committee discretion and a Committee seat less subject to loss.

The Panel ignored an earlier decision of the district court, *Anthony v. County of Sacramento*, 845 F.Supp. 1396 (ED, CA: 1994), but stretched across circuit lines to find support for dismissing the FAC in *Murphy v. CTA*, 638 F.Supp. 464, 467 (ND, IL: 1986). AX A-6. *Murphy* cannot control resolution of this appeal but a closer reading of it is instructive. Again, the Panel omitted key language just before that it quoted. "The Supreme Court ... also has required that the acts of state employees be under 'pretense'

of some state law." *Dang, supra*, quoting *Screws v. U.S.*, 325 U.S. 91, 111 (1945). *"For conduct to relate to state authority, it must bear some similarity to the nature of the powers and duties assigned to the defendants." Dang, supra*, at 480, quoting *Murphy, supra*, at 468 (emphasis original).

"Whether Knowles's actions related to the duties and powers incidental to his position as an Assemblyman or instead related to his role as a member of the Republican party," AX A-6 - 7, should have been answered in the former's favor. The facts pled show a clear connection between Knowles' *ex officio* Committee membership, his greater appointive power, heightened security of position and resulting enhanced credibility and prestige, and the subsequent ouster of Johnson and Wadsworth and violation of his own constituents' Constitutional rights. Knowles' "duties and powers incidental to his position as an Assemblyman" included appointive rights as an *ex officio* Committee member and a Committee seat at least as secure as that he held in the Assembly. Just as a Sheriff's duties include guarding his inmates' rights, *Anthony, supra*, an Assemblyman's include protecting his constituents' rights. Just as "[t]he Government is prohibited from retaliating for the lawful exercise of constitutional rights," *id.*, at 1400, its officials are bound. If a jury concluded from evidence supporting the pleadings in this case that Knowles "used his government position to exert influence and ... control" over his co-defendants to all Petitioners' detriment, its verdict would be upheld. *Dang, supra*, at 480.

The Panel cited *Laxalt v. McClatchy*, 622 F.Supp. 737 (NV: 1985), in stating that "[A]ll actions of a government official are not, simply by virtue of his official's government employ, accomplished under the color of federal law."

AX A-7. Laxalt's misconduct was using Senate stationery to demand a retraction, as required by Nevada libel law. "In so doing, he acted as would have any private citizen considering the possibility of filing suit for libel." *Id.*, at 747. Indeed, a public official with "greater access to the channels of effective communication," *id.*, at 748, quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974), "must exercise that opportunity." *Id.*, at 747.

Here, however, there was no such obligation incumbent upon Knowles and the law underlying Plaintiffs' civil rights claims is state, not federal, law; this is not a *Bivens* case. "The substantive law will identify which facts are material" in this case, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); the Panel's unsupported conclusion that Knowles' unrestricted appointive power is "immaterial" will not. The fact of Knowles' dually enhanced power flowing from his Assembly seat, derived from the substantive law of California's Elections Code, is material to, if not dispositive of, his liability. *Laxalt* has no precedential or factual value in resolving the state action question presented by this case and the Panel erred in relying on it instead of on the allegations and inferences of the FAC.

IV. The Ninth Circuit Cast the Committee and Its Members Out of Their State Roles

The Panel's Opinion again stretched too far in asserting that "county central committees of political parties are private actors, not public agencies, even though they are regulated by the state." AX A-8.[3] Petitioners make no

---

[3]This assertion stems from the first opinion in *SF County Democratic Cen. Com. v. Eu*, 792 F.2d 802 (9th Cir. 1986), vacated and remanded "for further consideration in light of *Tashjian v. Republican*

claim that central committees are state actors for all purposes. Petitioners argue, and the caselaw allows, that in the limited context of regulating their popularly elected membership, central committees should be considered state actors subject to federal constitutional constraints.

In *Moore v. Panish*, 32 Cal.3d 535 (1982), California's Supreme Court allowed a committeeman to hold his seat and to run for another public office, but with this *caveat* ignored by the Panel:

> *"We are not unmindful that the federal courts have viewed certain racially discriminatory activities of political parties as state action which violated constitutional guarantees. Even in these cases, however, the courts have refused to characterize political parties as public organizations, but have focused instead on the impact of party primaries and membership rules on the effective exercise of the right to vote.* ... We hold that

---

Party of Connecticut," [479 U.S. 208 (1986)] in *Eu v. SF County Democratic Cen. Com.*, 479 U.S. 1024 (1987). Subsequently, the Ninth Circuit concluded "*Tashjian* supports our previous decision and [we] accordingly reinstate our *judgment* affirming the district court *for the reasons set forth in this modified opinion*," thereby replacing the judgment's first rationale. *SF County Democratic Cen. Com. v. Eu*, 826 F.2d 814, 818 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989) (emphasis added). However, the closest any of those reasons came to defining a committee was the Ninth Circuit's rather resigned admission that "The status of these committees under the Elections Code is less clear than the State would have us believe." *Id.*, at 825, fn 20. In neither encounter with *Eu*, nor in any other case, has either Court held central committees private actors for all purposes; they only held that they are not state actors who forfeit their I Amendment rights. Nor did the last two *Eu* cases consider either *Moore v. Panish* or *Malone v. Sup. Ct., infra.*

> the prohibition of dual candidacy contained in section 6402, subdivision (b) does not apply to the selection of members to party county central committees, but *express no opinion of whether party offices might be considered public for some other purposes." Id.*, at 545, fn 10. See also, *Unger v. Sup. Ct.*, 37 Cal.3d 612, 615 (1984): "... such entities are not agencies of the state for *all* purposes, ..." (emphases added).

In *Malone v. Sup. Ct.*, 40 Cal.2d 546 (1953), California's Supreme Court held that courts' reluctance to interfere with political committees' affairs does not render them immune from review.

> "Where, however, statutes conferring legal rights on members of a political party have been passed, the courts have the right to ascertain whether those rights have been violated and the decision of a party tribunal on such a question is of no binding effect. Moreover, if primary elections have been established by law, a candidate cannot be divested by a political organization [of] rights derived from such election, the question being no longer solely a political one, but one of law of which the courts must take cognizance. The same is true with respect to the rights of members of a party committee elected at a primary election conducted under public authority. ... Certainly where civil and property rights rather than politics and political dogma are involved, the courts will protect them." *Id.*, at 551 (citations omitted).

The FAC pled that central committees exist and operate "solely by virtue of, under and in furtherance of" California law, AX E, at ¶2, that Johnson and Wadsworth were elected to and ejected from the Committee under color of California law, AX E, at ¶¶7 and 28; but were removed from the Committee not for reasons allowed by statute, but because they were gay. The Panel should have accepted this allegation as true since it was ruling on a FRCvP 12b6 motion to dismiss. One of Petitioners' rights, as "members of a party committee elected at a primary election conducted under public authority," was not to be thrown off the committee contrary to statute. Homosexuality is not a statutory ground for removal and Johnson and Wadsworth's right to keep their seats, and their electors' right to have their electoral choices remain on the Committee, are interests protected by federal court review.

Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978), stemming from a public office primary, provides a federal counterpart. After warning that federal courts should not endorse §1983 suits in "garden variety election irregularities," *id.*, at 1076, the court held that

> "[t]he right to vote remains, at bottom, a federally protected right. *If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under §1983 therefore in order. ... [T]he question of the availability of a fully adequate state corrective process is germane.* But there is precedent for federal relief where broadgauged unfairness permeates an election, even if derived from apparently neutral action. *Cf. Brinkerhoff-Faris Co. v. Hill*, 281

> U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).
>
> * * *
>
> *In cases falling within such confines, we think a federal judge need not be timid, but may and should do what common sense and justice require."* *Id.*, at 1077-8, allowing both class action status and relief under §1983 (emphases added).[4]

The Panel erred in interpreting the four state action tests narrowly instead of broadly in this civil rights case, per *Felder v. Casey*, *supra*. The public function test, especially in election cases, is hardly as constricted as the Panel stated. While *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 157-158 (1978), defined a public function as the private exercise of sovereign powers, state action may also exist in contests other than "state-regulated elections or elections conducted by organizations which in practice produce 'the uncontested choice of public officials.'" *Id.*, quoting *Terry v. Adams*, 345 U.S. 461, 484 (1953). The Court also noted "that the conduct of the elections themselves is an exclusively public function" and that the "ordinary commercial transaction" therein did not merit the "special provision to protect equal

---

[4]*Cf.* Respondents' oaths upon assuming Committee membership to "uphold and defend the Constitution and laws of the United States and of ... California," with their disregard of due process in ousting Petitioners; *query*, whether or not taking such an oath is a consent to federal jurisdiction for purposes of enforcing it. The five-month delay in finalizing the ruling on Respondents' motion to stay Petitioners' Superior Court action demonstrates the inadequacy of the "state corrective process" and provides a compelling reason to exercise federal question jurisdiction in this case, if not, ironically, to exercise federal diversity jurisdiction under the "local prejudice" rationale illustrated by the impasse in El Dorado Superior Court. *Cf.* 28 USC §1343a.

access to the ballot" codified in 42 USC §1971a1; the political arena is especially deserving of Constitutional safeguards as one of the "very few ... 'exclusively reserved to the State.'" *Id.*, at 158 and fn 7.

In *Morse v. Republican Party of Virginia*, 116 S.Ct. 1186 (1996), the Court expanded this theme and when political action was state action in a Voting Rights Act challenge to a poll tax Virginia Republicans imposed upon their members. Going beyond the bounds set by *Flagg*, the Court held that "the Party exercised delegated state power when it certified its nominee for automatic placement on Virginia's general election ballot." *Morse*, *supra*, at 1193-4.

Central to its decision were the "white primary cases" underlying the 1965 Act. *Id.*, at 1201-1206; *Terry, supra*, and *Smith v. Allwright*, 321 U.S. 649 (1944). The Court did not limit those cases to race discrimination election disputes. *Morse*, *supra*, at 1204, and *Republican Party of Arkansas v. Faulkner County, Arkansas*, 49 F.3d 1289, 1293 (1995) ("The White Primary cases teach that realities, not labels, must guide our review of election laws."). *Accord*, *Smith v. Salt River Project*, 109 F.3d 586, 591 (9th Cir. 1997), quoting *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986). Nor did the Court find either *Flagg* or *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), precluded finding state action by a political party "unless its nominees are virtually certain to win the general election." *Morse*, *supra*, at 1207. Finally, in quoting from its holding in *Eu, supra*, at 232, to justify intervention where "'necessary to prevent the derogation of civil rights of party adherents' (citing *Smith*)," the Court doubted that finding jurisdiction would "abridge associational rights protected by the First Amendment." *Morse*, *supra*, at 1209-10.

Discrimination against homosexuals cannot be distinguished from discrimination against Blacks, *cf. Morse, supra*, at 1204; the right protected - the right to vote and to have one's vote count (*U.S. v. Mosley*, 238 U.S. 383, 386 (1915) - is fundamental and its guarantees apply across all lines.[5] "Generally speaking, the Supreme Court has required that parties be inclusive, allowing all interested persons to participate in party activities." *Republican Party of Arkansas, supra*, at 1294. Precluding Plaintiffs from the political process pursuant to their sexuality is inconsistent with the Constitution's guarantee of equal protection. *Romer v. Evans, supra.* See also, *Nabozny v. Podlesny*, 92 F.3d 446, 458 fn 12 (7th Cir. 1996): "Of course *Bowers* [*v. Hardwick*, 478 U.S. 186 (1986),] will soon be eclipsed in the area of equal protection by ... *Romer v. Evans*[,]" and *Holmes, supra.* (Reinhardt, J., dissenting)

The Panel's opinion relied upon two decisions to support its finding no state action, presumably under the public function test, but neither is binding, each is distinguishable and both admit state action might exist in some

---

[5]"*The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women and other minorities.* (See, e.g., *Gay Students Org. of Univ. of New Hampshire v. Banner* (1st Cir. 1974) 509 F.2d 652, 657; *Acanfora v. Board of Education of Montgomery County* (4th Cir. 1974) 491 F.2d 498, cert. den., 419 U.S. 836 [42 L.Ed.2d 63, 95 S.Ct. 64]; *Aumiller v. University of Delaware* (D.Del. 1977) 434 F.Supp. 1273, 1292-1302.)" *Gay Law Students Assn. v. Pac. Tel. & Tel. Co.*, 24 Cal.3d 458, 488 (1979). *Cf., Watkins v. US Army*, 875 F.2d 699, 719, 724-731 (9th Cir. 1989) (Norris and Canby, JJ., concurring); *Holmes v. California Army National Guard*, - F.3d - (9th Cir. 1997) (Reinhardt, J., dissenting); *Evans v. Romer*, 882 P.2d 1335, 1355 (CO: 1994) (Scott, J., concurring) and *Romer v. Evans*, 116 S.Ct. 1620, 1623, 1628 (1996) (emphasis added).

circumstances. *Banchy v. Republican Party of Hamilton County*, 898 F.2d 1192 (6th Cir. 1990), involved an Ohio law that made its central committees "responsible for filling vacancies that occur in certain county offices formerly held by party members." *Id.*, at 1194. The Sixth Circuit held that while not

> "all actions of a central committee constitute state action[, w]hen performing the narrow duties assigned to it under section 305.02 the Central Committee of the Republican Party may well be engaging in state action. *State ex rel Hayes v. Jennings,* 173 Ohio St. 370, 374, 182 N.E.2d 546 (1962) ("[t]he power conferred by Section 305.02, Revised Code, upon central committeemen makes them public officers.")" *Id.*, at 1194-1195.

"Intra-party elections of *officers* is not 'state action.'" *Federspiel v. Ohio Republican Party*, 867 F.Supp. 627, 623 (1994), citing *Banchy, supra*, at 1196. (emphasis added). While in *Banchy*, committee members retained their basic intra-party elective offices and lost only their opportunity to elect their intra-party officers, Petitioners lost much more: Johnson and Wadsworth, their positions as twice-elected committeemen; all other Petitioners, their elected representatives, through whom they hoped to influence the Committee's actions during each's terms. (*Cf.*, *Federspiel*, *supra*: "election of different members is the best way to change their decisions. ... This is the democratic process at work.")

In *Blank v. Heineman*, 771 F.Supp. 1013 (NE: 1991), a committee chairmanship was lost but committee membership remained intact; no state action was found. *Id.*, at 1014. Here, Respondents disallowed even that vestige of

the electorate's trust in Johnson and Wadsworth and contravened their expressed will by depriving them of their elected representatives and saddling them with a rejected candidate. The same distinction exists between *Federspiel, supra*, (committee officers vs. executive committee members) and this case: elementary elective office, the basis of a republican form of government, not higher intra-party office or political parties' right to "select their leaders," was violated by Respondents' acts. AX A-11.[6]

Wadsworth's Committee membership was not that of an officer; he had barely mounted the ladder of party management before he was knocked off it by the same clique for the second time in as many years. If such abuse of the fundamental right to vote does not shock the conscience, it surely goes beyond a simple intra-party dispute and violates the integrity of the electoral process, the basis for any democracy. *Burson v. Freeman*, 504 U.S. 199, 214 (1992); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964), and *Yick Wo v. Hopkins*, 118 U.S. 356, 371 (1886).[7]

---

[6]The public office/private post distinction should not control because any distinction between the two was blurred by both the position Knowles held on the Committee by virtue of his Assembly seat and by Respondents' ejecting Johnson and Wadsworth at his bidding. His prestige and influence, along with his local office's location in the Committee's own headquarters, also tightens the nexus between a purportedly private committee and those State officials who hold both their own, and the power to appoint alternate, membership on it.

[7]That Petitioners do not claim "Defendants violated their constitutional rights by conducting an election in an unconstitutional manner," AX A-10, is no bar to relief. That they were twice thrown off of the Committee after twice being voted onto it is enough: whether acting before, during or after the election, Respondents compromised its results as surely as if they had not allowed it to go forward at all. The reality of Respondents' removing Johnson and Wadsworth, whatever label was

"The joint action test for state action is met where private persons are 'willful participant[s] in joint activity with the State or its agents" that effects a constitutional deprivation." *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983). Petitioners' allegations of how Assemblyman Knowles caused their removal satisfies this state action test since a conspiracy was pled. Even if his co-Respondents acted privately, Knowles' state actor status makes them liable too. *Adickes v. Kress*, 398 U.S. 144, 152 (1970).

The state compulsion test justifies finding state action in the facts of this appeal, despite the Panel's opinion that *Adickes* "simply bears no similarity to the present case." If none of the cited provisions of the CEC "compelled or encouraged the Committee to remove Johnson and Wadsworth on the basis of their sexual orientation," they set the basis for an uncodified practice or "custom of removing Committee members on the basis of homosexuality." AX A-12; *cf.* AX E at ¶27 and *Adickes, supra*, at 168. With two elections and two ejections a matter of record, the situation is clearly "capable of repetition, yet avoiding review."[8]

Finally, Petitioners have demonstrated a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be

---

slapped over it, was the loss of their right to participate in the political process at its primary level and the disenfranchisement of 1500 voters.

[8]Respondents' actions are protected from electoral demise as well, since the opinion stifles popular input into party politics. Because the Panel's prevented "nipping in the bud" the practices complained of, they can grow unimpeded to preclude homosexuals - or anyone else with views of a Republican Party different from Respondents' - from entering party politics while preventing them from judicially redressing this deprivation, a two-fold equal protection violation per *Romer, supra.*

fairly treated as that of the State itself." AX A-13, quoting *Jackson, supra*. As an Assemblyman, Knowles used the power, prestige and placement of his office and effectively "insinuated [him]self into a position of interdependence" with the Committee so that it readily participated in discriminating against and ousting Johnson and Wadsworth. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).[9]

> "Membership in the Central Committee is recognized as a de facto prerequisite to higher office, both elected and appointed, within the Republican Party at the county, state and national levels, and within municipal, county, state and national government, and thereby benefits government with a pool of persons presumably experienced in the workings of the democratic process within the republican form of government guaranteed by the Constitution of, and throughout, the United States." AX E, at ¶2.

These allegations reflect political reality, *Republican Party of Ark., supra,* and *Stout v. Democratic County Central Committee*, 40 Cal.2d 91, 94 (1952): "committeemen perform important duties as a means through which the right of suffrage is exercised ..." and are not so conclusory as to be disregarded. *Western Mining Council v. Watt*, 642 F.2d 618, 624 (9th Cir. 1981). Committees act symbiotically with the State, both in using State facilities and services - and in being used by State actors like Knowles.

---

[9]The restaurant's lease that provided the nexus in *Burton* is directly analogous to the use of State facilities permitted in CEC §7430 and Knowles' use of the Committee's headquarters as his own local office.

V. The Ninth Circuit Ignored the Issue of Whether 42 USC §§1985(3) and 1986 Claims Were Pled

In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), this Court stated, without further limitation, that §1985(3)'s

> "... language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Id.*, at 102 (italics original).[10]

Petitioners pled that Respondents threw them off the Committee because they were homosexuals, clearly a "class-based invidiously discriminatory animus," under *Romer, supra*, and the rights to vote and to participate in the political process are clearly secured to all.

Dismissing Petitioners' claim under 42 USC §1985(3) without leave to amend, the district court relied on *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 332 (9th Cir. 1979), and *High Tech. Gays v. DISCO*, 895 F.2d 563, 574 (9th Cir. 1990), holding that homosexuals are not a suspect

---

[10]If Plaintiffs must show state action for their §1985(3) claims to proceed, given the Court's fractious 5-4 decision in *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983), they have done so. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), discussing when *stare decisis* applies, should be reviewed with an eye towards revisiting *Scott*. *Scott* did not bar §1985(3) class-based *animi* other than racial ones; it only barred claims of "bias towards others on account of their *economic* views, status or activities." *Id.*, at 836 (emphasis original).

class for §1985(3) purposes. Behind both cases lurked *Doe v.Commonwealth's Attorney*, 403 F.Supp 1199, 1202 (ED, VA: 1975), also one of the bases for *Bowers, supra*, upon which *High Tech. Gays, supra* was itself based. *Id.*, at 571. *DeSantis* noted that:

> "... While §1985(3) has been liberated from the now anachronistic historical circumstances of reconstruction America, we may not uproot §1985(3) from the principle underlying its adoption: The Governmental determination that some groups require and warrant special federal assistance in protecting their civil rights. This underlying principle must continue to determine the coverage of §1985(3).
>
> * * *
>
> ... it cannot be said that homosexuals have been afforded special federal assistance in protecting their civil rights. The courts have not designated homosexuals a 'suspect' or 'quasi-suspect' classification so as to require more exacting scrutiny of classifications involving homosexuals." *Id.*, at 333.[11]

In *Bowers, supra*, the issue being decided was "whether

---

[11]Even if *DeSantis'* rationale that "special federal assistance" is required to find suspect class status, such "assistance" may be found, ironically, in the "Don't ask, don't tell" military policy. While the vitality of that policy is unknown, *cf.*, *Able v. U.S.*, - F.Supp. - (ED, NY: 1997) (dead) and *Holmes v. California Army National Guard*, - F.3d - (9th Cir. 1997) (alive), its purported provision of due process in military discharges of gays and lesbians nevertheless constitutes one form of special federal "assistance" directed at, if not for, homosexuals, and reinforces *Romer*'s finding that they are a discrete class.

the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Id.*, at 190. *Bowers* neither addressed nor decided if homosexuals, as a class, merited equal protection, the Court specifically noting that "Respondent does not defend the judgment below based on the ... Equal Protection Clause, ..." *Id.*, at 196, fn 8. Issues of the fundamental right to vote and to participate in political activity under the due process and equal protection guarantees were also left for another case.

That other case is *Romer v. Evans*, *supra*, which one Court of Appeals has already recognized seriously undermines *Bowers.*[12] *Nabozny v. Podlesny*, 92 F.3d 446, 458 fn 12 (7th Cir. 1996). *Romer* recognized that

> "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. ... Respect for this principle explains why laws singling out *a certain class of citizens* for disfavored legal status or general hardships is rare. A law declaring that in general it shall be more difficult for one group of citizens to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. *'"The guaranty of equal protection of the laws is a pledge of the protection of equal laws."'"* *Id.*, at 1628

---

[12]And which another Court of Appeals still seems unable to swallow over a year after being force-fed *Romer* on remand. 116 S.Ct. 2519 (1996), vacating and remanding (and awaiting) *Equality Fdn. of Greater Cincinnati, Inc. v. Cincinnati*, 54 F.3d 261 (6th Cir. 1995).

(emphasis added; citations, including *Yick Wo, supra*, omitted).

Romer held that Colorado law's prevented homosexuals from securing protection against the injuries protected by both its general public-accommodation laws and by its "specific legal protections for this targeted class," *id.*, at 1626, with no rational relationship to any legitimate state purpose. *Id.*, at 1629. Thus, this Court allowed that homosexuals may be a discrete class under the law and confirmed that *Bowers*, its progeny and predecessors do not bar homosexuals, as a class, from equal protection of the laws. Continued reliance upon either *DeSantis* or *High Tech Gays* is thus mistaken. There should be no doubt, after *Romer*, that homosexuals are an identifiable class entitled to equal protection of the law.

CONCLUSION

Petitioners have shown that Assemblyman Knowles and the Committee were state actors under the facts of this case. Their allegations that their expulsion from the Committee was based on their membership in a disfavored class should have been addressed by the Ninth Circuit. That it was not is another departure from accepted principles of jurisdiction that should be remedied by granting *certiorari*.

Respectfully submitted

G. MICHAEL GERMAN
Counsel of Record
22 Second Street - 310
San Francisco, CA 94105-3406
(415) 536-1838
Attorney for Petitioners